No. 11707

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, a corporation,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHILP, individuals and co-partners,
Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners,
Defendants and Cross Appellants.

No. 11707

REPLY BRIEF OF APPELLANT CONTINENTAL CASUALTY COMPANY

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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TABLE OF CASES

The cross appeal of defendants Goerig and Philp herein has been conclusively adjudicated in our favor by this court in *Goerig v. Continental Casualty Co.*, 167 F. 2d 930, decided May 5, 1948, in another appeal arising out of this same job. Precisely the same question was raised by Goerig and Philp in both appeals. Accordingly the judgment should be affirmed upon said cross appeal upon the authority of the said former decision of this court and the authorities therein cited.

The decision of this court upon motion to dismiss Macri appeal herein is in 167 F. 2d 107. As suggested in said decision, Macris have now for the first time objected to the form of the judgment. No such objection was ever made in the district court. Continental now states and makes a matter of record that it has never had and does not now have any objection to its judgment over against the cross appellants being either construed or amended as conditional on the non-payment of the judgment by them. Continental will be very glad to release such judgment immediately if the same be affirmed and if the same be paid by cross appellants.

Replying to page 74 of the Macri brief relative to additional attorneys' fees of Continental on this appeal, this is, of course, a matter of practice and procedure. The substantive right of Continental to attorneys' fees under the indemnity contract is undisputed. The Washington

cases cited by Macris merely refer to "the practice of this court," that is, the state supreme court. However, this is not an action in the state supreme court. Consequently the federal decisions authorizing allowance of additional attorneys' fees on federal appeals govern. This difference in appellate practice was doubtless considered by the district court in allowing such a relatively small sum as Continental's attorneys' fees herein. Whether the substantive right to attorneys' fees is based on statute or contract is wholly immaterial.

With those two exceptions, Continental adopts and relies upon all of the argument and authorities cited in the Macri brief that this action should be dismissed. Of course, it is elementary that if there is no liability of the principal, there is no liability of the surety.

> *Fidelity & Deposit Co. v. Duke,* (CCA 9) 293 Fed. 661; *Sarasota v. America Surety Co.,* (CCA 5) 68 F. 2d 543; *National Surety Co. v. Breece,* (CCA 10) 60 F. 2d 847; *General Chemical Co. v. Standard Wholesale T & A Works,* (CCA 4) 101 F. 2d 178; *Phelps v. Dawson,* (CCA 8) 97 F. 2d 339, 116 A.L.R. 1343; *50 Am. Jur.* 994 §135; *Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co.,* 179 Wash. 631, 38 P. 2d 346; *Spokane County v. Prescott,* 19 Wash. 418, 53 Pac. 661.

REPLY TO APPELLEE SCHAEFER'S BRIEF

Appellee Schaefer's brief, as this court will have readily noted, consists almost entirely of a statement of alleged reasons for recovery against the Macris. Very little is

said as to any reason for recovery against Continental—then only as an after-thought in the last few pages of the brief.

Appellee has intentionally ignored and therefore tacitly conceded that in an action under the Miller Act federal rather than state law governs.

> Additional authorities so holding are: *U. S. v. Starr,* (CCA 4) 20 F. 2d 803, 805; *Farnsworth Co. v. Electrical Supply Co.,* (CCA 5) 112 F. 2d 150, 154; *Craig v. U. S.,* 69 Fed. Supp. 229; *Francis v. Southern Pac. Co.,* U. S. 92 L. Ed. 610, decided March 15, 1948; *Commissioner v. Tower,* 327 U. S. 280, 287, 90 L. Ed. 670, 676.

In the Starr case Judge Parker said:

> "Of course, the rights of the parties in this case are to be determined in the light of the law as declared by the federal courts. . . .
>
> "But in the absence of some such statutory provision, the courts will not read into a bond an obligation which it does not contain."

In the Farnsworth case Judge Sibley said:

> "The rights and liabilities of the parties to a bond given to the United States under the federal statute rests upon the federal law and not the state law, and the implied right to have funds from the contract which are knowingly received by a furnisher of labor or materials applied to these claims rather than to some other debt, is not to be affected by local law."

In *North Shore Boom Co. v. Nicomen Boom Co.,* 52 Wash. 564, 570, 101 Pac. 148, the court said:

> "This question is governed by the United States statutes and the decisions of the United States courts are binding."

Appellee at pages 75-78 of his brief inconsistently contends that the federal rather than Washington state law governs his right to maintain this action. If the federal law governs in one respect, it governs in all respects.

It must therefore be concluded that it now stands undisputed that the entire fundamental basis of the district court's decision against Continental was admittedly fallacious and erroneous.

Appellee Schaefer's brief directly substantiates our contentions. Throughout the brief appellee repeatedly states and recognizes that his right of recovery, if any, is based directly upon Macris' alleged breach of the subcontract. For example, at page 4 appellee states:

> "On the other hand, Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing wilful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon it by the subcontract."

Appellee's contention that he is entitled to recover more than the agreed contract price under the subcontract is based entirely on recovery of damages for Macris' alleged breaches of the subcontract, although ingeniously sugar-coated under the name quantum meruit.

Obviously, however, recovery of additional compensation for such alleged breach of contract constitutes an attempt to recover damages for such breach of contract—by whatever name it may be called.

Manifestly a recovery in excess of the agreed contract price because of Macris' alleged breach constitutes the recovery of damages for breach of contract. This is true in this case especially where it is undisputed that the contract price was the same as the reasonable value of the work if Macri had not breached the contract.

Under the subcontract each party was to do certain things. Admittedly the reasonable value of the things Schaefer was to perform was the contract price. Any recovery in excess thereof is based on damages for breach of contract by Macri in the performance of the things he was to do. But the surety is not legally liable therefor.

Although appellee's brief is not clear, we infer therefrom that he concedes that he cannot recover damages for breach of contract against the surety. That is of course well settled law.

As pointed out at page 22 of our opening brief and in the Macri brief, the district court held that there was no express contract between Macri and Schaefer for the performance of additional work or for the payment of additional compensation. Schaefer has not cross appealed

from the judgment, and therefore cannot urge error in this respect. *Smith v. Boise,* (CCA 9) 104 F. 2d 933, 938; *Cochrane v. M & M Transp. Co.,* (CCA 1) 110 F. 2d 519; *Texas Co. v. Central Fuel Oil Co.* (CCA 8) 194 Fed. 1; *Swager v. Smith,* (CCA 4) 194 Fed. 762.

Therefore, and as pointed out in the Macri briefs, there is no merit to the argument in subdivisions 2 and 3 of the Schaefer brief, and there can be no recovery herein on the theory of an express contract for the payment of additional compensation, because there was none; and there can be no recovery herein upon an implied in fact agreement to pay additional compensation, because it is elementary that such an agreement will never be implied where there is an express contract between the parties, as there was here.

Appellee's argument seems based primarily upon alleged estoppel on the part of Macri. Manifestly even if there were such, there is clearly no estoppel on the part of Continental, and hence there can be no recovery against the latter.

Nor is there any merit, at least as against Continental, in subdivisions 1 and 7 of appellee's brief.

We have examined all of the cases cited and find that none of them are in point. With possibly three exceptions hereinafter referred to, none of them are even cases

arising under the Miller Act. None of them involve a situation such as we have in the instant case. In none of them (with the possible exception of the Zara case) did the surety urge a defense of non-liability on the bond under the Miller Act independent from the defenses urged by the principal contractor. In most of them there was not even a surety or bond involved. In none of them did the court permit a recovery against a surety for an amount in excess of the original total agreed contract price. In none of them was there a partial breach of contract and continued performance of the contract on the part of both parties.

The case principally relied upon, *U. S. v. Zara Contracting Co.*, 146 F. 2d 606 (brief p. 27, 80, 84) is clearly distinguishable. There, except for one $100 item, the subcontract was for the entire job covered by the principal contract. Two months after commencement of the work the principal contractor wrongfully and unjustifiably prevented the subcontractor from completing the work, and the principal contractor finished performance thereof. There was undoubtedly a total rather than partial breach of contract. The subcontractor did not continue performance but ceased and was in fact prevented from further performance. The court merely held that under such circumstances the subcontractor could recover on quantum meruit for such past performance. The amount of re-

covery, however, was substantially less than the total contract price. Everything that was done by the subcontractor was work required by both the subcontract and the principal contract, and consequently the surety was liable. There was no recovery of profit and the recovery was based on plaintiff's *"costs."* The principal contention of the surety apparently was that it was not liable for rental of equipment. The court also there held at page 609 that the plaintiff's claim for extra compensation in addition to the contract could not be maintained if he were relying upon the express contract. Also there the principal contractor had received additional compensation from the government for the same work performed by the subcontractor.

At page 611 the court said:

> *"It is therefore appropriate here . . . to make use of the contract as fixing the basic price."* (Citing authorities).

For the foregoing numerous reasons that case is clearly distinguishable, and actually it supports our position rather than that of appellee, as all of the labor there performed was supplied under both the principal contract and the subcontract and was used in the prosecution of said work; and therefore the amount sued for and recovered was *within the contract rather than outside of the contract.*

McDonald v. Supple, 96 Or. 486, 190 Pac. 215 (brief p. 28) was not a Miller Act case at all and did not even

involve a surety. It involved an abandonment of a contract by mutual acquiescence of both parties. It is fully distinguished at page 48 of the Macri brief.

Great Lakes Construction Co. v. Republic Creosoting Co., 139 F. 2d 456, (brief p. 29, 80) involved only two issues: (1) whether the action was barred by the one year statute of limitations and (2) whether the breach of the subcontract was on the part of the subcontractor or the principal contractor. It was conceded that the subcontractor had properly partially performed the work under the subcontract and that his work was of the reasonable value recovered in the judgment. The recovery was less than half of the contract price under the subcontract and approximately one-third of one percent of the contract price under the prime contract. The sureties did not appeal separately and raised no question of their liability as distinct from that of the principal contractor. The facts were that the principal contractor wrongfully, greatly delayed the work and prevented performance of the subcontractor in the installation of wooden floors in a new building. In the meantime, costs greatly increased. Thereafter the parties mutually abandoned the contract. The principal contractor purchased materials on hand from the subcontractor and performed part of the work. Thereafter the subcontractor completed the work pursuant to agreement between the parties merely because it could

do so more economically. In affirming the judgment, the court said:

> "On the trial it was held that Republic (subcontractor) had been prevented from the performance of his contract without his fault and that Great Lakes (principal contractor) had breached it. . . .
>
> "There was, as properly found by the trial court, an abandonment of the subcontract, and the acceptance of the work and material furnished by Republic upon the understanding detailed in the findings justified and required the recovery upon the quantum meruit which was awarded."

Manifestly that case has no applicability whatever here.

Nelson v. Seattle, 180 Wash. 1, 38 P. 2d 1034 (brief p. 29) did not involve the Miller Act nor even any surety at all. Moreover actually that case supports our position because the court there at page 9 said:

> *"Of course, recovery on quantum meruit is permissible only where the work done is not provided for in the contract. Strong & MacDonald v. King County,* 147 Wash. 678, 267 Pac. 436. *Since the contract provides for the removal of such material, Nelson cannot recover any additional amount on quantum meruit."*

In other words, under the authority relied upon by appellee, he cannot recover on quantum meruit as to any work done by him which was provided for in the subcontract.

On the point referred to by appellee, the facts there

were that the contract obligated the principal contractor to complete his performance in excavating a large hill within one year. Actually he delayed the work so that it took approximately half a year longer. The court merely held that under these special circumstances the subcontractor could recover from the principal contractor (no surety involved) the reasonable value of the work performed during said additional half year period. The case is therefore obviously not at all in point here.

Appellee's contention (brief p. 79) that there is a well settled rule of law that if under the law of contracts a subcontractor has a right of recovery against a principal contractor, he can likewise recover against the surety on a Miller Act bond, is wholly without foundation. No authority is or can be cited which has ever laid down such a rule of law. And of course if that were the law, there would be ample authorities so stating.

Manifestly appellee cannot sustain this contention, as he attempts, merely by citing a few cases where the surety interposed no separate defense but admitted that it was liable if the principal contractor was. That was the situation in each of the cases cited.

For example, in *U. S. v. John A. Johnson Contracting Corp.*, 139 F. 2d 274, (not the case we rely on) the surety did not attempt to interpose a separate defense. The court said:

> "The sole question for our determination is whether there is a contractual relationship, express or implied, between Worthington and the contractor."

In other words, the question was whether there was a novation so that a third party, Knecht, was substituted for Johnson as debtor to the plaintiff. Clearly this is not at all in point as authority for establishing liability of a surety.

Lange v. U. S., 120 F. 2d 886, (brief p. 80) affirmed judgment of Judge Coleman of Maryland in *U. S. v. Lange*, 35 F. Supp. 17, who later decided one of the principal cases relied upon by us, *U. S. v. John A. Johnson & Sons*, 65 F. Supp. 514. There is no inconsistency whatever between this earlier decision and his later decision upon which we rely. In the earlier case the surety made no contention that it was not liable if the principal was liable. The sole issue was whether discovery of unforeseen difficulties was sufficient consideration to support a new subcontract. The case does not have the slightest applicability here.

In *U. S. v. Standard Accident Insurance Co.*, 106 F. 2d 200, (brief p. 80), the surety interposed no separate defense. The principal contractor had agreed in writing to pay the subcontractor additional compensation for extra work. The court merely held the agreement valid and binding.

Appellee's statement that the court held in *Royalty Indemnity Co. v. Woodbury Granite Co.*, 101 F. 2d 689, (brief p. 81) that the surety is liable whenever the contractor is liable, is entirely erroneous. (One of the syllabi is misleading). The court did not state any such principle. It merely held that the surety is bound by the contract price in subcontracts, except in case of collusion, fraud or over-reaching, and declined to follow a Washington case to the contrary. *Here appellants* are the ones who are relying upon *the contract price.*

The cases cited by appellee at pages 81 and 82 are clearly distinguishable, as here, as found by the trial court, there was no express contract to pay for extra work, and recovery herein was not on that basis.

U. S. v. American Surety Co., 200 U. S. 197, 50 L. Ed. 437, (brief p. 82, 91) is likewise clearly distinguishable. All that the court there held was that one furnishing labor and materials to a subcontractor for the prosecution of the work under the contract has a valid claim against the surety. Obviously no such issue is presented here.

On the other hand, *U. S. v. John A. Johnson & Sons*, 65 F. Supp. 514, *L. P. Friestedt Co. v. U. S. Fire Proofing Co.*, (CCA 10) 125 F. 2d 1010, and the other cases relied upon by us, are directly in point and cannot be distinguished. Appellee has no alternative but to suggest (brief p. 89, 91) that the courts there "fell into error" and were "mistaken

in their view of the law." We submit, however, that those cases are sound and constitute much more substantial authority than the unsupported opinion of counsel for appellee to the contrary.

Finally appellee desperately contends (brief p. 92) that he is entitled to recover "on the principle of necessity." We are reminded of the famous dictum of the German chancellor in 1914 when Germany invaded Belgium that "necessity knows no law." Certainly we know of no law which would permit appellee to recover against Continental herein solely "on the principle of necessity."

It is well settled in Washington, the law of which appellee has contended governs, and elsewhere that in a suit on quantum meruit the contract price is the maximum limit of recovery. *Noyes v. Pugin,* 2 Wash. 653, 27 Pac. 548; *Bailey v. Furleigh,* 121 Wash. 207, 208 Pac. 1091; *Davis v. Thurston County,* 119 Wash. 414, 205 Pac. 840; *Dyer v. Pederson,* 112 Wash. 390, 192 Pac. 1002 (197 Pac. 622); *Chase v. Smith,* 35 Wash. 631, 77 Pac. 1069; *Rachow v. Philbrick,* 138 Wash. 214, 226, 268 Pac. 876.

Among numerous other authorities to the same effect are: *Hoyle v. Stellwagen,* 28 Ind. App. 681, 63 N. E. 780; *Keyhoe v. Rutherford,* 56 N. J. L. 23, 27 Atl. 912; *Oakley v. Duluth Superior Dredging Co.,* 223 Mich. 478, 194 N. W. 123.

In the Oakley case the court said:

> "If plaintiff did not breach the contract, and if defendant prevented full performance, plaintiff may sue in assumpsit for the work and labor performed and recover the value thereof, *not exceeding the contract price.*" (Citing authorities).

As stated in *Dickson v. Emmerson,* 154 Ore. 558, 68 P. 2d 439, decided by the same court long after *McDonald v. Supple:*

> "The plaintiff . . . is entitled to recover the reasonable value of the work done which inured to the benefit of defendant, *within the limits of the price of the total contract.*"

Regardless of anything that may have occurred and regardless of all that is said in appellee's brief, the fact remains that a subcontract was executed under which the subcontractor agreed to do certain things at a stipulated price. This judgment cannot be affirmed without entirely ignoring the subcontract; and there is certainly no proper basis for disregarding this contract. The fact also remains that under the subcontract the contractor was to do certain things. Continental did not execute a bond guaranteeing that Macri would do anything required of him under the subcontract, except to pay, within the limits of the contract price, for labor and materials that the subcontractor was obligated to and did furnish under the subcontract. The work done by Schaefer other than that required of him under the subcontract was work

which was to be done by Macri thereunder and which Schaefer was at no time obligated to do. At no time prior to the subcontract had Schaefer assumed to do any of the work required under the prime contract except that covered by the subcontract; and Macri had not assumed to let out to Schaefer any other work. The fact remains, according to Schaefer's contention, that Macri was failing to do the work that he had agreed to do and that it was because of this failure that Schaefer did work not required of him under the subcontract.

These facts cannot be changed by anything that has occurred or by any arguments that have been made. No agreement or understanding which the contractor and the subcontractor may have had after these facts came into existence can change them. They stand as an impregnable wall which cannot be ignored. They left the subcontractor in the position where he was not bargaining with the contractor for another subcontract to do some other part of the work required under the prime contract. On the contrary, they left him in the position where it was up to him to either terminate the subcontract because of the contractor's alleged failure to do the work he was required to do under it, or else do this work himself in order that he could go ahead with the subcontract and then *look to Macris* for the damages sustained by reason of his having to do something that he was not required to do under the subcontract.

The subcontractor was not a party to the prime contract and he had no obligations thereunder. Any work that he did under the prime contract was not by reason of any obligation that he had entered into under that contract. He had no obligation to do any work or furnish any labor or material other than that called for by the subcontract. In the absence of such obligation we have the simple question as to why the subcontractor should furnish labor and material other than that called for by the subcontract. The answer is clear and simple. He did so in order to enable himself to proceed with his subcontract, and his right to recover therefor cannot be based on any agreement or understanding he may have had with the contractor about being paid therefor, but is founded on the fact that upon the contractor's alleged failure to do the work or furnish the material he had agreed to do or furnish under the subcontract, the subcontractor had the right, upon electing not to terminate the subcontract, to put himself in the position where he could perform the subcontract and to *hold the contractor* for any damages he might sustain in thus putting himself in this position. These damages did not grow out of or flow from the fact that the subcontractor did certain work or furnished certain labor and material other than that required by the subcontract. While the work he did or the labor and material he furnished may or may not be the measure of the damages, they are not the thing or things that gave rise to or

caused the damages. The damages grew out of the alleged failure of the contractor to do work or furnish labor or material that he had agreed to do or furnish under the subcontract; and the bond does not guarantee that the contractor will do this work or furnish such labor or maaterial or that if he fails to do so and the subcontractor furnishes it that the contractor will pay the subcontractor therefor.

Moreover at pages 64-5 of his brief appellee again concedes that there has been no segregation or record of extra costs. The fact remains that there is no proof from which it can be determined what is the value of the work done by Schaefer which under the subcontract was to be done by Macri or the value of the work performed which under the subcontract was to be done by Schaefer.

It is no excuse for Schaefer to say that he could not or did not keep a record showing what part of the work he did was under the subcontract and what part was not. The burden of proving what work he did that was not called for under the subcontract, as well as its value, is upon appellee, and if he has done it in such a way as to put himself in the position where he cannot prove it, it is his fault, and of course he cannot expect to recover from the bonding company for something he cannot prove. He has not shown what this work was or the value of it and the proof he has submitted not only represents work

that was called for by the subcontract but also work that was not called for on the part of the subcontractor by the subcontract; and there is no way of determining under this proof what part of this work should be valued in accordance with the price fixed by the subcontract or what part of it should be valued on some other basis. It would therefore be impossible in any event for the court to arrive at any definite amount shown by the evidence that would be due Schaefer.

This judgment entered against Continental, far in excess of the agreed contract price, for work alleged to have been done by Schaefer completely outside of the scope of the contract, is clearly erroneous.

Appellee faces this dilemma: If what he did was within the scope of his subcontract, he can not recover more than the contract price therein agreed upon. If on the other hand, what he did was outside of the scope of his contract, the surety is of course not liable therefor.

We therefore submit that the judgment appealed from should be reversed and the action dismissed as to Continental, and that it recover from the cross appellants its reasonable attorneys' fees and costs in both courts.

Respectfully submitted,
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